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E. ROBERT SEAVER,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER ZENITH RADIO CORPORATION.

THOMAS C. MCCONNELL,
PHILIP J. CURTIS,
FRANCIS J. MCCONNELL,
JOHN BORST, JR.,
134 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Petitioner Zenith Radio Corporation.

Of Counsel:
McCONNELL, CURTIS, MAHON & BORST,
134 South LaSalle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.

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REPLY BRIEF FOR PETITIONER ZENITH RADIO CORPORATION.

QUESTIONS PRESENTED.

At pages 1 and 2 of respondent's brief an attempt is made to amend the questions presented to this Court in the petition for certiorari. Under Rule 23 of the Rules of this Court the questions presented are those set forth in the petition on which the writ was granted. Here they are set forth at pp. 4-6 of petitioner's main brief.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE.

We believe that we have made an adequate and accurate statement of the case at pages 6-13 of petitioner's main brief. We see no purpose to be served in taking issue with the various mis-statements made in respondent's statement. Those that are relevant are answered in the argument.

In the statement of the case and in the entire seventy-five pages of respondent's brief there is not a single record reference to any evidence that negatives in any particular petitioner's proof of the amount of its damages. The court below has at least rendered "lip service" to the legal sufficiency of these proofs. In its last opinion it says (AA 59-60):

> "There was testimony for Zenith, relied on by the district court, that in the four year damage period, had Zenith been free from the unlawful activity of the Canadian pool which virtually excluded it from the Canadian market, it would have enjoyed the same proportion of that market as it did in the United States market. In Canada its principal competitors were the same as those in the United States. Its promotion and advertising flowed back and forth between the two countries. Distributors in Canada were available, but were frightened off by the pool's activities and threats. It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated by virtue of the Supreme Court's decision in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264-65 (1946)."

It was conceded in argument in the District Court by respondent's counsel that there can be no evidence proffered

at a new trial that could be described as "newly discovered". Counsel stated: ". . . in asking for this admittedly extraordinary relief here, that we are not doing so on the ground of newly discovered evidence . . ." (AA 156).

It is apparent that there is no evidence in this record that in the slightest manner contradicts the damage computation contained in petitioner's Exhibit D. X. 220 (A 2661). Referring to this Exhibit respondent's counsel in argument in the District Court (AA 247), said:

> "Now, I recognize that no objection was made at the trial. I recognize, your Honor, that you asked him [Dodds] if he had any objection and he said he did not. That is clear in the record."

Having no record facts with which to negative petitioner's damage computations, respondent's brief attempts to support the untenable limitations and release defenses relied on by the court below. The contentions are answered under appropriate headings in the argument section of this brief.

At pp. 69-71 of respondent's brief Zenith and its counsel are berated because on the remand of this case to the court below Zenith's counsel asked Judge Walter J. Cummings to recuse himself. That sworn petition was not denied. It is printed in full in the appendix (AA 48-51) and speaks for itself.

Respondent's attack on the legal sufficiency of the petition leaves the issue in the posture where HRI insists on the affirmance of a decision by a panel of the court below, a member of which panel argued their case in the prior RCA proceedings, represented their co-conspirators in the pool and negotiated a release of which HRI claims the benefit and which Judge Cummings, as a panel member of the court below now erroneously holds, deprives petitioner of the right to sustain its judgment.

ARGUMENT.

I.

THE DISTRICT COURT HAVING DECIDED THE STATUTE OF LIMITATIONS AND RELEASE ISSUES CORRECTLY, NO ERROR OF LAW EXISTS UPON WHICH THE ORDER OF THE COURT BELOW CAN BE SUSTAINED.

At page 62 of respondent's brief it is stated:

> ". . . the decision of the Court of Appeals was not that, as a matter of discretion, the trial court should have granted a new trial. On the contrary, the Court of Appeals held that the trial court had committed errors of law (namely, the failure to give proper effect to the statute of limitations and the release defenses) and that to correct those errors of law, the taking of additional evidence on the issue of the amount of recoverable damages is necessary."

Aside from all other contentions it must be apparent as a matter of simple logic, that if the District Court committed no error of law in rejecting these defenses there can be no justification for granting a new trial to correct "errors of law."

(a) No Part of the Cause of Action for Treble Damages Asserted in Petitioner's Counterclaim "Accrued" Prior to May 22nd, 1959 and Therefore as a Matter of Law Could Not Be Barred by the Four Year Statute of Limitations.

The only damages asserted in the counterclaim were for lost profits occasioned Zenith by the illegal patent pool for the four years prior to the date on which it filed its counterclaim.

There is nothing in Section 4B of the Clayton Act which bars these damages. That Section provides (15 U. S. C. § 15b):

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced *within four years after the cause of action accrued . . .*" (Italics ours)

The court below says: "The law with respect to the statute of limitations in Sec. 15(b) of the Clayton Act is that the period commences to run from the last overt act of the conspiracy" (AA 58).

There is nothing in the Act itself that says the limitations period "commences to run from the last overt act of the conspiracy." This is an interpolation into the Act by the court below which has no Congressional sanction whatever. Certainly the court below has no power to legislate by writing provisions into the Act which are not there.

In *Radovich*, 352 U. S. 445, 454 (1957) cited at page 32 of our main brief this Court said that the courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." Here it is quite apparent that this is exactly what the court below has done.

The cases relied on by the court below in making its addition to the burdens of the antitrust laws are set forth in its opinion (AA 58). Except for the decision in *Century Hardware Corp.* v. *Powernail Co.*, 282 F. Supp. 223, 227 (E. D. Wis. 1968) which obviously is not in point for other reasons, every single one of those decisions was rendered before the Federal limitations statute was either enacted or otherwise applicable.

Up until the enactment of the Federal limitations statute, as this Court knows, the limitations applied to antitrust damage actions stemmed from state statutes. Ob-

viously, cases construing the various provisions of state statutes are not determinative or even persuasive in the construction of a Federal statute.

As we pointed out in our main brief (p. 33) the words to be construed in the Federal statute are: "four years after the cause of action accrued". It is conceded at pp. 40-42 of respondent's brief that "a cause of action 'accrues' when the plaintiff has a right to sue." In order to contend that Zenith's cause of action had "accrued" prior to the damage period, respondent has to make the assumption that a cause of action for lost profits could accrue before the profits had been lost. The cases cited at page 41 of respondent's brief do not even intimate that such can be the law.

It is self evident that the present damage award could not have been sued for prior to the filing of petitioner's counterclaim. This follows from the proof Zenith had to adduce to support the award. Thus Zenith had to show three things on the damage issue: (1) Zenith had to be in the electronics business from May 22, 1959 to June 1, 1963 or prepared to engage in that business in Canada (see this Court's opinion concerning the damage claim in England and Australia AA 26, 29); (2) Zenith had to have a comparable profit comparison in the United States and this had to be during the same time period as the damage period; (3) the illegal Canadian Radio Patents Pool had to be in operation during the time of the entire damage period.

The record conclusively shows that none of these three factors could have been proved as a basis for Zenith's damage award prior to the damage period.

That this Court did not consider the statute of limitations a bar to petitioner's damage proofs is shown in its opinion as follows (AA 18):

"The evidence was quite sufficient to sustain a find-

ing that competing business concerns and patentees joined together to pool their Canadian patents, granting only package licenses and refusing to license imported goods. Their clear purpose was to exclude concerns like Zenith from the Canadian market unless willing to manufacture there. Zenith, consequently, was never able to obtain a license. This fact and the pool's vigorous campaign to discourage importers, distributors, dealers, and consumers from selling, handling, or using unlicensed foreign merchandise effectively prevented Zenith from making any headway in the Canadian market until after the 1957 settlement with RCA and its co-defendants. . . .

"This evidence clearly warrants the inference that CRPL's past conduct interfered with and made more difficult the distribution of Zenith products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods *had consequences lasting well into the damage period.*" (Italics ours)

When the opinion was written this Court had before it the entire record in the instant case. We submit that to resolve the issue of the "fact of damage" this Court of necessity had to hold tacitly at least that as held by the District Court (AA 17) either the statute of limitations defense had no merit or had been waived. The obvious reason for this is that if this Court believed that the defense of limitations was a bar to consideration of pre-damage period conduct referred to in the above quotation, it would not have held such evidence proved "the fact of damage" because the only "fact of damage" that is relevant is that found within the four year damage period.

The statute of limitations defense was either a bar or not a bar to petitioner's damage proofs. If it did not bar consideration of pre-damage period conduct on the "fact of damage" issue, *a fortiori* it could not bar consideration of

this same evidence on the amount of petitioner's damage accruing within the damage period.

This Court in its opinion says: ". . . the damage award was confined to injuries sustained during the statutory period . . ." (AA 16).

In footnote 13 of its opinion, this Court says (AA 17):

> "Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim, and the findings of the District Court expressly limited the damages awarded to those occurring 'during the 4-year statutory damage period.' "

In the present posture of this case, assuming *arguendo* that this Court's opinion and mandate permitted the court below to take a fresh hold on the limitations issue, the ultimate question has to be whether the four year statute of limitations can bar damages accruing within the damage period caused by pre-damage period acts. The court below held that limitations barred such damage, and the correctness of this ruling is squarely presented to this Court. In our view, as pointed out above, it has already been passed on by this Court in determining the "fact of damage" issue.

As we have shown in our main brief the instant case can not be distinguished from the case of *Foster & Kleiser* v. *Special Site Sign Co.*, 85 F. 2d 742, 751 (9th Cir., 1936) cert. den. 299 U. S. 613 (1937). There the Court said, "The gist of the action under this section is for injuries inflicted pursuant to the conspiracy *for which the wrongdoer is liable.*" Obviously HRI, the wrongdoer, has been held liable in the instant case only for damages sustained during the damage period and it must of necessity follow that a statute of limitations defense is not even relevant to that part of the wrongdoer's liability.

At page 33 of its brief, respondent is forced to take the

position that "the cause of action accrues and the statute of limitations starts to run from the damage-causing conduct." Aside from being contrary to the statute itself the argument obviously proves too much. The unconscionable result would ensue that Zenith could not recover for the lost profit when the "damage causing conduct" took place because no lost profits had "accrued" and could not recover for the lost profit when it had "accrued" because the damage causing act was barred by limitations.

Zenith did not sue for any profit lost outside the damage period. That it could not sue for or recover for lost profits before they accrued is held by the following cases. *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 F. 2d 79, 81 (2nd Cir. 1939); *Lawlor* v. *Loewe*, 235 U. S. 522, 536 (1915); *Flintkote Company* v. *Lysfjord*, 246 F. 2d 368, 396 (9th Cir. 1957), Cert. den. 335 U. S. 835 (1957). Cf. *Volasco Products Co.* v. *Lloyd Fry Roofing Co.*, 308 F. 2d 383, 396 (6th Cir. 1962).

The argument relied on by the court below was termed an "affront to reason" in the supplemental opinion in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776, 795 (3rd Cir. 1967). There the Court said:

> ". . . the fact that some of the injury and damage occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period. Indeed, any other rule would be an affront to reason, for it would require the conclusion that injury and damages which were inflicted, as in this case, in 1955, by concrete and specific business transactions, were barred by the statute of limitations as long ago as 1918 or even earlier, because of similar but not identical conduct."

This Court said in reviewing *Hanover*, 392 U. S. 481, 501, n. 15 (1968), decided while the instant case was pending before this Court, "United has also advanced the argument

that because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's cause of action arose during that year and is now barred by the applicable Pennsylvania statute of limitations. The Court of Appeals correctly rejected United's argument in its supplemental opinion."

Respondent's counsel, realizing that *Hanover* controls the instant case unless it can be distinguished, say at page 39 of their brief:

> "The decision of this Court in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), neither decided nor discussed the question whether recovery could be had for activities occurring prior to the relevant damage period."

On the contrary, this Court expressly decided that question and discussed it in note 15 of its opinion and described United's conduct as a type of restraint that could not be dealt with under the antitrust statutes as "a violation which, if it occurs at all, must occur within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover."

We submit, that any fair reading of this Court's opinion in *Hanover* must compel the conclusion that the "accumulating" harm resulting in damages to Hanover during the damage period was the result in part at least of illegal activity by United prior to the damage period, i.e. the creation of the restrictions on the use of the shoe machinery. It is therefore apparent that *Hanover* cannot be distinguished from the instant case and must control its disposition.

Further, this Court in the instant case has already held that the harm done Zenith by the pool during the damage period was "continuous" and "accumulating". It said:

"The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period" (AA 18).

This Court further said (AA 19):

> "We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period. . . . HRI frankly conceded the continuation of the pool before the District Court, and it appears sufficiently clear that throughout this time Zenith was deprived of what had always been refused it—a license on pool patents permitting it to sell American-made merchandise in Canada."

In the Court of Appeals' supplemental opinion in *Hanover*, the Court said: "The policy of the statute of limitations is maintained by allowing recovery for measurable injury within the period and barring recovery for injury beyond it." *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 377 F. 2d 776, 795 (3rd Cir. 1967).

Respondent also says *Hanover* is distinguishable because the only damages there awarded "were those caused by illegal conduct *within* the applicable damage period . . ." (Res. br. 39).

Here this Court has already held (AA 17, n. 13):

> "Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim, and the findings of the District Court expressly limited the damages awarded to those occurring 'during the 4-year statutory damage period'. 239 F. Supp., at 76."

This Court further said in this case (AA 24):

> "The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed."

Since the District Court did find (A 2908) "that the necessary causal relation between the pool's conduct and the claimed damage existed," the court below on remand was not authorized to disturb the finding because this Court's ruling on this mixed legal and factual issue is the "law of the case" and is conclusive in the court below. See *U. S.* v. *Haley*, 371 U. S. 18 (1962); *U. S.* v. *Parke, Davis & Co.*, 365 U. S. 125 (1961); *Briggs* v. *Pennsylvania R. Co.*, 334 U. S. 304 (1948).

The cases cited in respondent's brief to support the decision of the court below that some part of the damage award is barred by limitations because the "overt acts" outside the damage period are barred are not in point and even if they were they could not stand against this Court's decision in *Hanover* or the implications involved in this Court's decision in the instant case.

In the case of *Crummer* v. *DuPont*, 223 F. 2d 238 (5th Cir. 1955), cited at pp. 34, 35, 36 of respondent's brief, plaintiff's business had been completely destroyed at a time when the suit was barred by limitations—there was no continuing impact at a time within the statutory damage period.

In *Farbenfabriken Bayer, A. G.* v. *Sterling Drug, Inc.*, 153 F. Supp. 589 (D. C. N. J. 1957), aff'd., 307 F. 2d 210 (3rd Cir. 1962), cited at pp. 34 and 36 of respondent's brief, a six-year New Jersey statute was involved. The complaint alleged no "overt act" of any kind within the statutory period. The case is so distinguished in *Schenley Industries, Inc.* v. *N. J. Wine and Spirit Wholesalers Ass'n.*, 272 F. Supp. 872, 887 (D. C. N. J. 1967) the Court saying:

> ". . . the defendants' reference to the so-called 'overt act doctrine' in this Circuit is misleading, since the *Farbenfabriken Bayer* case turned on the absence of any overt act alleged within the period of limitations."

In the case of *Momand* v. *Universal Film Exchange, Inc.*, 43 F. Supp. 996 (D. C. Mass. 1942), cited at pp. 36, 40-41 of respondent's brief, a continuing invasion of plaintiff's rights was involved. The case supports the position taken by petitioner here.

The "overt act" doctrine on which the court below relies is opposed by later and better reasoned decisions in other Circuits. Thus, in *Schenley Industries, Inc.* v. *N. J. Wine and Spirit Wholesalers Ass'n.*, 272 F. Supp. 872 (D. C. N. J. 1967), defendants moved to strike certain complaint allegations concerning "overt acts" occurring more than four years prior to the complaint on the ground that any damage claims based on such acts were barred by limitations.

The Court said (pp. 887, 888):

> "Schenley contends . . . it can even recover for damages caused by earlier acts which are part of a continuing conspiracy.
>
> "*Insofar as such acts are alleged to have caused damage within the last four years,* I agree. In the first place, the legislative intent behind Section 4B of the Clayton Act, 15 U. S. C. § 15b, was not so much the expunction of long standing claims as it was the effective enforcement of the Act through a uniform period of limitations throughout the nation which would reduce forum shopping. *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F. 2d 575, 580 (9 Cir., 1964) . . .
>
> * * * * *
>
> "The Courts have resorted to a variety of metaphysical theories to deal with the conceptual complexities of an antitrust conspiracy in a sizeable industry. They are reviewed and disposed of to the satisfaction of this Court by the excellent and comprehensive opinion of Judge J. Skelly Wright in *Delta Theatres, Inc.* v. *Paramount Pictures,* 158 F. Supp. 644 (D. La. 1958). I agree with Judge Wright that in the case of a continuing conspiracy, the plaintiff

may recover for any damage which occurs within the period of limitations. See authorities cited in *Delta Theaters, supra,* 158 F. Supp. at page 649, n. 20, 21."

As stated by Judge Wright in *Delta Theaters* v. *Paramount Pictures,* 158 F. Supp. 644, 649 (E. D. La. 1958):

"... It is the opinion of this court that the better rule is that stated in the leading case of Bluefields S.S. Co. v. United Fruit Co., 3 Cir., 243 F. 1, 20: 'The statute began to run when the cause of action arose, and *the cause of action arose when the damage occurred.* Then action might have been brought.' In the case of successive damages suffered day by day from a continuing conspiracy, the statute begins to run on each day's damage as it occurs. When suit is brought, the plaintiff may recover only for damages inflicted during the period of limitation preceding the filing of the complaint." (Italics ours)

A Court of Appeals case decided after the enactment of the Federal statute of limitations and which is directly contrary to the decision of the court below, is *Highland Supply Corp.* v. *Reynolds Metals Co.,* 327 F. 2d 725 (8th Cir. 1964).

In that case an antitrust action was based on alleged violations of Section 7 of the Clayton Act and Section 2 of the Sherman Act against an aluminum producer which had acquired a florist foil company and then reduced prices of aluminum foil below the cost of production. The District Court dismissed the complaint on the ground that the acquisition and price cutting activities were the only damage causing overt acts, which acts had occurred more than four years prior to the filing of the complaint.

On appeal, the Eighth Circuit reversed on the ground that plaintiff's cause of action did not accrue until his damage was sustained. The Court said, p. 731:

"... the District Court in the case at bar, deeming Reynolds' 'acquisition' of Arrow and the date of the

latter's 'price reduction' as the two overt acts which could give rise to a private claim for damages by appellant, dismissed all its claims, with prejudice. This, solely on the ground that such overt acts occurred more than four years prior to the commencement of the instant action. Appellant's complaint . . . makes claim for damages because of appellee's violation of Section 2 of the Sherman Act, *supra,* during the entire time that Reynolds possessed monopoly power. The statute of limitations in respect to a private right of action under Section 5(b) [sic] of the Clayton Act, *supra,* 'beg(ins) to run when the cause of action (arises), *and the cause of action (arises) when the damage occur(s).*' . . ." (Italics ours)

The Court then said (p. 732):

> *"To hold otherwise, as the District Court ruled, is to say that some damage that might have been sustained by appellant was barred before it accrued;* i.e. before appellant sustained injury to its business or property because of appellee's continuous violation of Section 2 of the Sherman Act." (Italics ours)

We submit that a fair reading of the terms of the Federal limitations statute itself shows the decision of the court below to be based on false assumptions and to constitute clear error.

The cornerstone of the decision of the court below is *Steiner* v. *Twentieth Century-Fox Film Corporation,* 232 F. 2d 190 (9th Cir. 1956). The *rationale* of that case is analyzed and its fallacy made clear by the District Court opinion in *Streiffer* v. *Seafarers Sea Chest Corp.,* 162 F. Supp. 602 (E. D. La., 1958). There the Court said (p. 605):

> "In *Steiner* v. *20th Century-Fox Film Corporation, supra,* relied on by the defendant, this overt act rule was justified by analogizing the antitrust suit to an ordinary tort action for personal injury, where all damage subsequently appearing may be attributed to a single blow and must be recovered in a single

action. However, the damages inflicted by a conspiracy in restraint of trade *may arise from the cumulative effect of a great variety of business devices among which it is impossible to apportion each item of financial loss.* Moreover, in the case of a continuing business conspiracy, the plaintiff may bring his action only for such damages as are already apparent, for the incidence of future damages may depend on unpredictable factors. The conspiracy may cease, or a change in the business climate may render its efforts harmless to the plaintiff, or the plaintiff may voluntarily abandon his enterprise.

". . . and in antitrust cases, the rule is that the cause of action *accrues* on the occurrence of actual damage, and successive damage gives rise to successive causes of action against which the statute of limitations will run as they accrue day by day." (Italics ours)

The Court further said (p. 605): "The difficulties in applying the rule that the cause of action created by 15 U. S. C. A. § 15 accrues on the occurrence of an overt act were discussed by this Court in *Delta Theaters* v. *Paramount Pictures, supra.* The rule was rejected there as being in conflict with the terms of the statute itself which predicates the existence of the cause of action on the occurrence of damage *without regard to the time when the proximate cause of such damage was set in motion*" (Italics ours).

Actually, the court below has since tacitly conceded its error in a case it decided three months after the decision in this case. In the contract buyers case (*Baker* v. *F. & F. Investment*, 420 F. 2d 1191 (7th Cir. 1970)) the court below holds that the statute of limitations does not bar a suit for treble damages under the antitrust statutes for excessive payments made under installment contracts executed at a time barred by the applicable limitations statute. The case is in direct conflict with the decision

of the court below in the case at bar in its holding that damage causing acts outside the damage period, i.e. the execution of the installment contracts, can give rise to a suit for damages sustained within the damage period. Certainly the execution of the installment contracts had to contribute in some manner to the damage the contracts caused.

As a matter of interest the opinion in the contract buyers case was written by Judge Walter J. Cummings and joined in by Judge Roger J. Kiley, two of the judges on the panel who decided the instant case.

(b) The 1957 Release Could Not Be Held to Release a Cause of Action That Did Not Arise Prior to May 22nd, 1959 Without Construing It as a Contract to Bar Future Causes of Action Under the Antitrust Laws and Therefore Illegal.

Just as the statute of limitations has no application to damage claims accruing during the statutory damage period, so a release executed in September, 1957 could not release damages accruing from June 1, 1959 to May 31, 1963. This appeared self evident to the District Court.

The following colloquy occurred between the Court and respondent's counsel (AA 88-89):

> "The Court: When was the RCA release signed?
>
> "Mr. Kayser: It was signed as I understand it, on September 27, 1957.
>
> "The Court: As I understand it, they are only claiming according to your chart, from May 22 of 1959 to May 22 of 1963.
>
> "Mr. Kayser: Yes, your Honor, that is very true.
>
> • • • • •
>
> "The Court: I am not sufficiently astute today to understand your theory . . . so that I can understand how this release in '57 had anything to do with what occurred in '59 to '63."

We have already shown that petitioner's cause of action did not even exist until petitioner sustained damages in the form of lost profits.

Highland Supply Corp., 327 F. 2d 725 (8th Cir. 1964) discussed above, so holds as follows (p. 731):

> "Appellant's complaint . . . makes claim for damages because of appellee's violation of Section 2 of the Sherman Act, supra, during the entire time that Reynolds possessed monopoly power . . . *'the cause of action (arises) when* the damage occur(s).' *Then only can the action be brought.*" (Italics ours)

However, the court below construes the release to bar "recovery from HRI of past, present and *future* damages flowing from any misconduct of HRI prior to the dates of the releases" (AA 57). So construed the release becomes a contract against public policy and illegal and void insofar as it is applied to petitioner's damage award.

Since the damages allowed here embrace lost profits during the damage period which could not have "accrued" at all unless the Pool had continued its operations during the entire damage period, the inescapable effect of the construction of the court below is to release a future cause of action for treble damages under the antitrust laws. This was admitted by respondent's counsel in the District Court. Thus in colloquy with the Court the following occurred (AA 95):

> "The Court: . . . Assuming that perhaps there was a conspiracy in existence prior to the day of this release and that this conspiracy continues among other co-conspirators after the date of the release, what is Zenith's position in regard to those co-conspirators in the conspiracy that continues after the date of the release which in any way have some unlawful effect on Zenith's business?"

"Mr. Kayser: Well, I would think, your Honor, that absent any exceptional circumstances that this release would not apply."

A release attempting to destroy a future cause of action under the antitrust laws is illegal as against public policy. This is made patently clear in the case of *Fox Midwest Theatres* v. *Means,* 221 F. 2d 173, 180 (8th Cir. 1955) where the Court of Appeals said:

"Any contractual provision which could be argued to absolve one party from liability for future violations of the anti-trust statutes against another would to that extent be void as against public policy. (Citation). This is because the effect of such a release could be to permit a restraint of trade to be engaged in, which could have impact, not simply between the parties, *but upon the public as well.* Such a release, if recognized as having any validity of that nature, could therefore itself operatively serve as a contract 'in restraint of trade.' Section 1 of the Sherman Anti-Trust Act, 15 U. S. C. A., § 1, of course, brands all contracts in restraint of trade as 'illegal'." (Italics ours)

The cases of *Twentieth Century-Fox Film Corporation* v. *Winchester Drive In Theatre, Inc.,* 351 F. 2d 925, 931 (9th Cir. 1965) and *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.,* 249 F. 2d 5 (3rd Cir. 1957) on which the court below relies to sustain its holding did not involve a release of future damages and did not consider the question of whether the common law doctrine of constructive release extends to damages which had not accrued and could not be sued for at the time of the release. Obviously the cases cited are not in point.

The cases cited at page 24 of respondent's brief are not antitrust cases and no issue of illegality was raised or decided. Nor do those cases hold that a party not named

in the document can have the benefit of contractual provisions concerning "future damages resulting from conduct occurring prior to their execution" under the doctrine of "constructive release."

In its brief, page 31, respondent says there is nothing in *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944) or *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942) "either directly or by way of analogy, which would indicate that the releases should not benefit HRI. Those cases stand for the proposition that federal law should control in deciding federally created rights or liabilities, . . ." We cited those cases in our main brief to show that common law doctrines should not be extended as the court below attempts, to limit federally created rights, namely, treble damage suits under the antitrust statutes.

In colloquy about the release in the District Court the following occurred (AA 93, 94):

> "Mr. Kayser: . . . This is an unqualified release of these three. Anybody else which according to Zenith was a party up to September 27, 1957 is released, released them for everything that they did in the past up to that time for all damage which might thereafter be suffered from any acts which occurred up to September 27, 1957. Anything which results after the date from any act done by any of them up to that date.
>
> "The Court: Is it your theory that this release releases all the members of the Canadian Pool? I want to be clear on this.
>
> * * * * *
>
> "Mr. Kayser: Yes it does, your Honor. There are at least three cases clearly on the point involving antitrust treble damage cases.
>
> "The Court: That is by releasing one conspirator in a conspiracy you automatically release all other conspirators from the beginning of the world to the end of the world.

"Mr. Kayser: No, no, up to the time of the release and for any acts or any damage suffered thereafter by reason of acts occurring up to the time.

"The Court: By another co-conspirator who is not a party to the release?

"Mr. Kayser: Yes, your Honor, I don't think that there is any question that that is the law."

Neither in the District Court, the Court of Appeals, nor here has respondent cited any authority to support that position except the decision of the court below. On the other hand, the *Sola* and *Mercoid* cases (discussed at pp. 39, 40 of our main brief) squarely hold that to "the federal statute and policy, conflicting state law and policy must yield." And, as we have shown, to extend the common law doctrine of "constructive release" to a person not a party to the document for a time subsequent to its date and thus to grant a complete release of a cause of action not arising for more than a year and a half after the release was signed, is violative not only of the policy of the statute but of the express provisions of the Federal antitrust laws as well.

(c) Under the Clear Language of the RCA Settlement Agreement, HRI Was Not Entitled to the Benefit of the Releases.

The Court of Appeals, in a one sentence adoption of the respondent's release argument, based its decision on the erroneous factual premise that the settlement documents contain no limitation with respect to co-conspirators intended to be bound or benefited. The Court said: (AA 57).

"Since . . . Zenith did not reserve its right against HRI, the releases given by Zenith clearly barred recovery from HRI of past, present and *future damages* flowing from any misconduct of HRI prior to the dates of the releases. *Twentieth Century-Fox Film Corp.* v.

Winchester Drive-In Theatre, 351 F. 2d 925, 931 (9th Cir. 1965), *cert. denied*, 382 U. S. 1011 (1966); *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F. 2d 5 (3rd Cir. 1957)."

Respondent attempts to defend this position at pages 28 et seq. of its brief without making any reference to or explanation of the express limitation with respect to the parties covered which appears in its own Exhibit No. 48 upon which it relies (A 2783), i.e., the RCA settlement agreement describing and providing for the contemporaneously prepared and executed releases. The limitation of the releases with respect to parties covered is clearly spelled out in the first paragraph of the agreement:

> "1. All parties to the Delaware action (C. A. No. 1247, consolidated action) and to the Chicago action (No. 48 C 1818) to dismiss all their claims with prejudice; RCA, GE and Western Electric each to grant Zenith and Rauland, respectively, a general release and Zenith and Rauland each to grant RCA, GE and Western Electric, respectively, a general release, *each such release, to the extent either party may request, to bind or benefit the parent*[1] *and subsidiaries* of the party giving or receiving such release ('subsidiaries' to include corporations in which the party has stock ownership of 50% or more)."[2] (Italics ours)

---

1. In the case of Western Electric, the inclusion of "parent" was necessary to extend the release to A. T. & T. of which Western Electric was a subsidiary since A. T. & T. was not a party to the litigation.

2. As respondent's counsel correctly note, the releases "were part of the settlement" agreement (Res. br. pp. 22-23). However, the releases were deleted from Exhibit 48 and are not in evidence because Hazeltine offered the agreement and the pleadings in the RCA case in support of its then representation to the trial court that Hazeltine had no relationship whatsoever with any of the activities of the conspirators involved in the RCA case (A 393-6, 658-660, 921-2). This is a position exactly opposite to the one now taken, i.e., that HRI was a full fledged member of the conspiracy and therefore entitled to assert the alleged release.

Clearly paragraph 1 of the agreement, consonant with the concurrently referred to releases, spells out with particularity that each release binds or benefits only the party and the parent and subsidiaries of the party giving or receiving it and the benefits are further strictly limited to "subsidiaries . . . in which the party has stock ownership of 50% or more." Even if RCA, G. E. or Western Electric owned 49% of the stock of HRI, under the plainly expressed reservation and limitation of the settlement agreement they could not properly claim any "benefit." Yet respondent's counsel, at page 22-23 of their brief, with no explanation state:

> "The releases in question were part of the settlement of prior litigation between Zenith and its subsidiary on the one hand and RCA, General Electric and Western Electric on the other hand . . .
>
> "In September 1957, the *RCA-Zenith* litigation was settled without trial (PX 43, 48, A. 2751-52, 2783-86) . . . *There was no reservation of rights against third parties.*" (Italics ours)

The settlement agreement clearly expresses the intent to exclude from any "benefit" even subsidiaries of the parties in which their stock ownership is less than 50% and, *a fortiori,* all other conspirators not within the definition.

The very authorities respondent induced the Court of Appeals to rely upon and which it now urges upon this Court adopt the modern rule which gives effect to such expressed intentions to limit the parties to be covered and the holdings of those cases therefore defeat the respondent's argument on the facts of this case. See cases cited in opinion of court below (AA 57).

Respondent contends quite correctly that the courts in the cited cases adopted the so-called Restatement of Torts rule governing releases in antitrust conspiracy cases. In *Twentieth Century-Fox* the Court succinctly stated that rule as follows:

> ". . . the modern majority rule [is] that joint tortfeasors are released *unless* an express contrary intention is demonstrated . . ." (*Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre,* 351 F. 2d 925, 931).

The fundamental rule of construction, *Inclusio Unius Est Exclusio Alterius,*[3] would be enough to exclude respondent. In addition, as pointed out above, under the clear language of the agreement, respondent would be entitled to the benefits of the releases only if it was a co-conspirator in which RCA, G. E., or Western Electric owned 50% or more of its stock. If RCA, G. E. or Western Electric owns a stock interest in HRI sufficient to bring it within the specific terms of the settlement agreement and release, counsel have carefully concealed that fact from the record.

While the Restatement rule adopted in the cited cases is sufficient to destroy respondent's position on the facts of this case, there is the more reasonable modern rule followed by a number of courts and adopted in § 877 of the California Code of Civil Procedure and in § 4 of the Uniform Contribution Among Joint Tortfeasors Act. Under that rule "A release by the injured person of one tortfeasor . . . does not discharge other tortfeasors unless the release so provides." The District Court in the *Twentieth Century-Fox* case persuasively reasoned that this rule should be adopted by the Federal courts rather than the Restatement rule. *Winchester Drive-In Theatre* v. *Twentieth Century-Fox Film Co.,* 232 F. Supp. 556, 562 (N. D. Cal. S. D. 1964). It more logically places the burden on the wrongdoers to negotiate for their co-conspirators and to specifically provide for their release. There is no persuasive reason for shifting that burden from wrongdoers to their injured

3. "The certain designation of one person is absolute exclusion of all others." Black's Law Dictionary, 4th ed., page 906.

victims. The wrongdoers know the identity of all the co-conspirators while their victims often do not.

This Court generally expressed its approval of the modern rules in *Aro Manufacturing Co.* v. *Convertible Top Co.*, 377 U. S. 476, 501 (1964), when it said:

> ". . . It is also true that under the old common-law rule, a release given to one joint-tortfeasor necessarily released another, even though it expressly stated that it would have no such effect. See Prosser, Torts (2d ed. 1955), at 243-244. . . . But the rule is not applicable. Even in the area of nonpatent torts, it has been repudiated by statute or decision in many if not most States, see Prosser, supra, at 245, and by the overwhelming weight of scholarly authority. E.g., American Law Institute, Restatement of Torts (1939), § 885(1) and Comments b-d . . ."

While the Court cited the Restatement, its further reference to page 245 of Prosser indicates that Prosser's recommendation for the adoption of the more liberal and logical version might be adopted in an appropriate case.

Prosser's recommendation is as follows (p. 245):

> "The only desirable rule would seem to be that a plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so, . . ." (See p. 272 3rd ed. 1964).

Under either version of the rule, however, respondent's position is untenable on the facts of this case. Since the RCA agreement contained express limitations as to the parties intended to be released and HRI was not included therein, it was error to hold that HRI was entitled to the benefit of the release even assuming it were otherwise applicable.

Finally, even accepting *arguendo* the farthest reaches of respondent's release argument, the most that can be said for it is that some pre-damage period illegal activity was mixed with damage period illegal conduct to cause

the petitioner's four year loss of profits. Since the cumulative effects of such pre-damage period conduct could not be measured until Zenith actually entered the Canadian market, the 1957 release in all events could not bar recovery of such future damages (See pp. 9, 18-20 *supra*). Moreover, the lost profits resulted from a combination of the cumulative effects of pre-damage period activity and the continuation of the pool during the damage period. Petitioner therefore was not required to apportion its damages between such pre-damage and damage period activity. This Court so holds in its opinion, which is the law of this case, saying (AA 14, n. 9):

> "... It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. *Continental Ore* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 702 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 143-4 (1968) (concurring opinion)."

See also this Court's discussion of a tortious admixture of legal and illegal damage causing acts in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S., at page 265, in which the rule to be applied is the same as that in the tortious confusion of goods.

Since, as we have shown, the District Court decided the issue of the releases correctly by refusing to change its Canadian damage findings no mistake of law in the District Court's ruling is shown.

(d) The Affirmative Defenses of Limitations and Release Were Waived Under Rule 12(h) of the Federal Rules of Civil Procedure.

We pointed out in our main brief that the court below made no attempt to rule on the merits of the waiver issue but cavalierly disposed of it by saying (AA 56):

> "It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery."

Certainly the court below had no way of knowing what was in the trial court's mind and there is nothing in the record to show that the trial court did not base its rejection of the affirmative defenses, as stated by this Court, on either a lack of merit or waiver. However, what the trial court had in mind is beside the point. The question presented here is whether its decision is right.

This Court ruled that the trial court either rejected the limitations defense or considered it waived under Fed. R. Civ. Proc. 12(h) (AA 17). In *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588 (1911), it was held that on certiorari, ". . . this court has the entire record before it, with the power to review the action of that court, as well as direct such disposition of the case as that court might have done . . ." We pointed out in our main brief that if the decision of the trial court to reject the affirmative defenses was correct *on any ground* it should have been affirmed by the court below and therefore should now be affirmed here.

We have shown in the preceding sections of this brief that the rejection by the trial court of these defenses on their merits was a correct decision and that the court below is in error in holding to the contrary. It is equally true that the decision of the court below can and should be

reversed on the ground of waiver. Certainly, this Court cannot be precluded from ruling on the issue by the statement of the court below that "the [trial] court's ruling was not on the basis of waiver."

The waiver issue has already been argued in our main brief, pp. 42-45, and that argument need not be repeated here. However, at pp. 51-55 of its brief, respondent takes a new approach and attempts to torture the record into a showing that the trial court excused its late assertion of the so-called affirmative defenses by permitting it to make a late filing of its pleas of limitations and release.

The trial court was very careful not to permit these defenses to be filed *nunc pro tunc* as of the date of respondent's answer to the counterclaim in 1963. If it had done so it could have been plausibly argued that an amendment to the answer had been permitted. In fact, however, leave to file the defenses in support of a motion to dismiss was permitted *nunc pro tunc* as of April 1, 1965 (AA 254), the date the motion was made. The defenses and motion were then actually filed within the ensuing five days (A 3048, 3049) after the District Court had already ruled that there would be no change in the findings as to Canada (AA 251). This was almost two years too late because under Rule 8(c) of the Federal Rules of Civil Procedure an affirmative defense such as release or limitations must be pleaded in the answer and under Rule 12(h) it is waived if not presented in the answer.

As the court below said in a different case:

> "Defendants having failed to plead the statute of limitations, it was waived. Defendants subsequent motion for a summary judgment did not revive a defense which had been waived . . ." (*Roe* v. *Sears, Roebuck & Co.*, 132 F. 2d 829, 831 (7th Cir. 1943)).

Here, respondent never even asked for leave to amend its answer or to file the defenses *nunc pro tunc* as of the date of its answer to the counterclaim. Further, the trial court in refusing to reopen or set for rehearing its Canadian damage findings showed that there was no action by the trial court that even by inference or implication could be construed as being in relief of respondent's waiver so as to permit a trial of the limitations or release issues.

At page 52 of its brief respondent again argues its contention, which was overruled by the trial court, that the reason it did not plead limitations or release with its answer was that they were not relevant to the cause of action as respondent's trial counsel, Lawrence Dodds, understood it.

This entire contention was based on respondent's false assertion that its counsel was mislead by an affidavit of Frank Crotty, Zenith's patent counsel (A 63). Only an excerpt from the affidavit is quoted and the whole contention was a complete misrepresentation in order to persuade the trial court that Crotty was limiting the allegations of the counterclaim to a claim for damages between the time of the filing of Zenith's answer to the patent infringement complaint in April, 1960 and the filing of the counterclaim on May 1, 1963.

Counsel do not point out that the Crotty affidavit made all the allegations of the counterclaim a part of the affidavit by reference (A 63). Moreover, the counterclaim in no way limited Zenith's claim for four years of damages (A 64-69).

Further, the motion for leave to file the counterclaim stated "Said counterclaim arises out of the matters set forth in paragraphs 12 and 13 of defendant's answer herein *and* current related unlawful activities of plaintiff occurring since the filing of the answer . . ." (A 62) (Italics ours).

Unfortunately for the respondent's contention Lawrence B. Dodds as respondent's counsel, in his trial brief described the damage period as "for the four-year period from June 1, 1959 to May 31, 1963".[4]

The trial court was singularly unimpressed with the contention that respondent's counsel did not know four years of damages was being sought and therefore had not raised the limitations and release defenses in the answer. In the course of the argument the following colloquy occurred (AA 144):

> "The Court: I say we are on notice pleading here in the Federal Court . . .
>
> "Mr. Kayser: That's right, and we had no notice of this cause of action, your Honor. That is the point.
>
> "The Court: I mean, it may be due to somebody's inability to understand the English language, but to me it appears you have notice based upon what I read to you yesterday."

And the further colloquy took place (AA 87):

> "The Court: Do you think this is merely gilding the lily and has no legal effect in their counterclaim when they refer to the conspiracy to prevent importation . . . Is that just nice language or is it the basis of a law suit?
>
> "Mr. Kayser: It is not the basis of the lawsuit which they pleaded, your Honor . . .
>
> * * * * *
>
> "The Court: Well, I can't say that, looking at the pre-trial briefs, that there wasn't adequate warning that this was their theory prior to the time that any evidence was adduced. * * * That is the nub of the whole question, *and the nub of the damages was the failure to permit importation of American-made merchandise into these three countries.*" (Italics ours)

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4. Zenith Court of Appeals Appendix pp. 348 & 447 which appendix constitutes part of the record in this cause.

That the trial court never intended to excuse respondent's 'waiver' of the so-called affirmative defenses is shown by the court's statement ". . . there has to be an end of litigation. I don't intend to permit a second chance to do the things that might have been done at the first trial" (A 3527).

The attempt by respondent's counsel to twist a record such as is shown by the above into a ruling by the trial court excusing respondent's waiver of affirmative defenses because of "surprise" is obviously without merit.

Finally, the court below could take no action under the express direction of this Court's mandate which was inconsistent with this Court's opinion.

This Court's reference to the release and limitation defenses as "belatedly raised" (AA 17) is certainly inconsistent with a ruling that they were pleaded in time and are still in the case. Nor can meaning be given to the words "unwaived" and "properly asserted" appearing in this Court's opinion if the defenses were unwaived (AA 17, n. 13). In using these words this Court expressly pointed out that it need not "deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an unwaived statute of limitations defense is properly asserted" (AA 17). We suggest that the use of such qualifying words can mean only that this Court considered these defenses "belatedly raised" and that the effect of the District Court's rejection of the defenses was to hold them waived. If we are correct in this analysis then the decision of the court below granting a new trial of the damage issue is inconsistent with this Court's opinion and must, aside from all other reasons, be reversed because not authorized by this Court's mandate.

We submit that a clear case of waiver is presented and

that in effect the District Court so ruled and that such ruling could not be reversed by the court below by its statement "It is our view that the court's ruling was not on the basis of waiver, . . ." (AA 56).

II.

THE PROOF OF THE AMOUNT OF PETITIONER'S DAMAGE IS LEGALLY SUFFICIENT TO SUSTAIN THE DAMAGE AWARD.

(a) There Is No Merit in Respondent's Mature Market Argument.

There is an involved and "metaphysical" argument advanced at pp. 18-22 of respondent's brief to the effect that petitioner's damage computation is legally insufficient because based on a "mature market" concept. The trial court found no merit in it and refused to disturb its Canadian damage findings on account of it. The court below has likewise refused to follow it.

In colloquy between the trial court and respondent's counsel the following occurred (AA 97):

> "Mr. Kayser: . . . Zenith [is] claiming, as they do, a fully mature market here beginning May 22, 1959.
>
> "The Court: They claim they had a mature market or that but for the conduct of Hazeltine they would have had one.
>
> "Mr. Kayser: They are claiming that they were entitled to the benefits of a fully matured market, yes.
>
> "The Court: Which they said they would have had, had it not been for the conduct of Hazeltine as co-conspirators.
>
> "Mr. Kayser: That's right.
>
> "The Court: All right."

Actually the proofs showed Zenith had the same share of the Canadian market in 1959 as in 1963, i.e., 3.1% in 1959 and 3.2% in 1963 (AA 16), showing that faced with pool re-

strictions Zenith could never improve its market position in Canada.

The court below concedes that the proper measure of the amount of petitioner's damage was applied by the District Court. It said (AA 59): "The measure of proof is the difference between the percentage share that Zenith actually enjoyed during the damage period and the percentage it would have had as a free competitor."

The only available measure of what Zenith could do "as a free competitor" was in the comparable United States market during the damage period when and where it was a "free competitor".

This Court, tacitly at least, approved respondent's proof when it said (AA 16, n. 11): "The computation of damages, prepared by Zenith's experts and accepted by the District Court, see 239 F. Supp., at 76, reflects a comparison between Zenith's percentage share of the United States television market, ranging from 15.6% in 1959 to 21.7% in 1963, and Zenith's actual share of the Canadian market during the same period, ranging from 3.1% in 1959 to 5.2% in 1961 and down to 3.2% in 1963. Although we discuss only the measure of damages utilized for computing Zenith's injury in the Canadian television market, a comparable method was employed to determine Zenith's lost radio sales."

The court below also concedes its validity saying (AA 60): "It is our view that this was competent evidence, prima facie, upon which the amount of damage could be reasonably approximated by virtue of the Supreme Court's decision in *Bigelow* v. *RKO Radio Pictures,* 327 U. S. 251, 264-65 (1946)."

This Court in admonishing the court below to follow the teachings of *Bigelow* said (AA 23):

> "In *Bigelow,* a treble-damage plaintiff claimed injury from a conspiracy among film distributors to

> deny him first-run pictures. He offered evidence comparing his profits with those of a competing theatre granted first-run showings and also measuring his current profits against those earned when first-run films had been available to him. This Court, reversing the Court of Appeals, found the evidence sufficient to sustain an award of damages."

Bigelow cuts the ground right out from under respondent's argument that such a comparison was invalid because it assumed a "mature market" for Zenith's products in Canada. In *Bigelow* the comparison was objected to on the ground that there was no proof of what petitioner's theatre would do with an earlier run of pictures because it had not had a "first run" playing position before and therefore had no mature "first run" playing position and also that the record affirmatively showed that both petitioner's theatre and the respondent's with which it was compared had always operated under the illegal Chicago system of release and therefore there was no open market comparison shown by the proofs.

As a matter of fact in *Bigelow* the Court of Appeals for the 7th Circuit had reversed the case because there, in contradistinction to here, there was no proof of an open market with which to compare the theatre's earnings in a restricted market (150 F. 2d 877, 884-885). This Court reversed that holding because the results of such a comparison were not available. The conspirators had prevented any open market comparison by destroying such an open market in the United States for motion picture films for over twenty years.

In *Bigelow*, 327 U. S. at 264, 265, it was further said:

> "... [I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from

> the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs . . .
>
> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."

Here respondent asserts (Res. br. 21) its continuous wrongdoing since 1926 as a member of the Canadian Pool to show that it had made proof of a mature market in Canada unavailable.

The argument is not only precluded by *Bigelow* but it ignores the fact that proof of a "mature market" in Canada was not only unavailable but irrelevant because petitioner's damage exhibit did not compare two market periods in Canada but the illegally restricted market result in Canada with the free market result in the United States during the same period of time.

However, there are other reasons why there is no merit in the "mature market" argument. At best it is an argument directed at the weight of petitioner's Exhibit D. X. 220 (A 2661) which was admitted in evidence without objection (A 769) and which the court below concedes makes out a prima-facie case of the amount of petitioner's damages.

The court below held in the case of *Milwaukee Towne Corp.* v. *Loew's, Inc.,* 190 F. 2d 561, 566 (7th Cir. 1951), that if the evidence of the amount of damages is competent the weight of the evidence is for the trier of the facts.

The Court said:

> "Neither do we need to follow defendants in their detailed argument designed to show numerous fallacies and inaccuracies in the exhibit prepared and submitted by plaintiff's accountant, for the reason that under the rationale of the *Bigelow* case we are satisfied that

> it was within the province of the trier of the facts to rely upon the computations there disclosed, providing, of course, there was proof of the fact of damage . . ."

Here the fact of damage issue is concluded by this Court's opinion.

There are still other reasons why there is no merit in the respondent's "mature market" theory in Canada.

Joseph Wright, Zenith's president, testified without contradiction that on June 1, 1959, "but for the pool" Zenith "would have had a going market there" (A. 3490).

Respondent says we cannot sustain this position because Zenith is barred from claiming damages resulting from conduct taking place at any time prior to the damage period or prior to the releases (Res. br. 24). If this contention could be valid it would destroy the probative value of a comparison which the court below has expressly approved and this Court has tacitly approved here and expressly approved in *Bigelow*. This must be so because the statute of limitations would thus always destroy proof that in the absence of the conspiracy a "mature market" position would have been attained.

(b) There Is No Merit in Respondent's Argument That Pre-Damage Period Conduct Could Not Be Considered on the Damage Issue.

The court below says, in paraphrasing this Court's opinion (AA 57):

> "Damages were awarded, the Court said, on the assumption that were it not for the conspiracy, Zenith would have had sixteen per cent of the Canadian market instead of its actual three per cent on May 22, 1959 and throughout the damage period. The Court then stated that since the district court attributed the deficient share on May 22, 1959 to the conduct of the pool, that conduct necessarily preceded the deficiency,

and therefore pre-damage period conduct necessarily resulted in some part of the damage awarded."

What the court below overlooks is that this fact is of no legal significance unless the pre-damage period illegal conduct is barred from consideration by limitations. We have shown at pp. 4-17 of this brief that it is not barred.

In addition to what we said there and without regard to the effect of tolling it is clear that the permissible limitations period would in any event extend back to April, 1956. Zenith's answer was filed April 7, 1960 and alleged in paragraphs 12 and 13 thereof as an affirmative misuse defense the same antitrust violations which were the basis for petitioner's proofs and judgment for treble damages. This pleading was the equivalent of a treble damage counterclaim. See *Dairy Foods, Inc.* v. *Dairy Maid Products Corp.*, 297 F. 2d 805 (7th Cir. 1961). The counterclaim filed in 1963 expressly adopted paragraphs 12 and 13 of the answer and as a supplemental pleading brought into the case damages for lost profits which had accrued both before and after the answer had been filed.

In its opinion this Court has already noted that the statute of limitations period could be expanded on the theory that the counterclaim related back to an earlier pleading. Thus this Court says (AA 8, n. 2):

> "No argument was made that the counterclaim, in whole or in part, related back to an earlier pleading, thereby expanding the damage period to include years prior to 1959, Cf. *Bull* v. *United States*, 295 U. S. 247, 262, and n. 10 (1935); *Cold Metal Process Co.* v. *E. W. Bliss Co.*, 285 F. 2d 231 (C. A. 6th Cir. 1960), cert. denied, 366 U. S. 911 (1961). Compare Fed. Rule Civ. Proc. 15(c) (amended pleading relates back to date of original pleading if the 'claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading')."

That argument is now made at page 35 of our main brief.

The respondent says our argument cannot be sustained that the District Court could infer from the evidence that the pool prevented an earlier beginning because the District Court made no finding to that effect.

Findings of fact are sufficient when they adequately apprise an appellate tribunal of the basis of the decision. *Seligson* v. *Roth*, 402 F. 2d 883, 887 (9th Cir. 1968); 5 Moore's Federal Practice (2nd Ed. 1969) ¶ 52.06[1], pp. 2705-17. We submit that the District Court's Finding XXXVI (A 2908) adequately disposes of the issue and this Court has concluded it by saying (AA 18):

> "It could also rationally be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefor suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed."

On page 20 of its brief respondent argues that petitioner's Exhibit D.X. 220 (A 2661, A 519) showing the amount of petitioner's loss of profit in the Canadian market merely assumed that Zenith would have had a mature market at the beginning of the damage period. On the contrary, the assumption was supported by the testimony of both Wright, Zenith's President, and Kaplan, Zenith's Treasurer (A 461, 528), whose testimony this Court holds the trial court was entitled to rely on.

This Court said (AA 22, n. 18): ". . . and we see no adequate basis in the record for refusing to accept the testimony of the two Zenith officers as probative evidence."

That this Court is correct in its holding is shown by the corroborative evidence attached as Appendix B, Schedule 2, to Zenith's brief in No. 49 October Term, 1968 of

this Court showing that after the entry of the injunction against the pool on April 5, 1965, Zenith sales of television and radio increased from $4,719,000 in 1964 to $9,078,000 in 1966 and to $12,694,000 in 1967. Since these are public records this Court can take judicial notice of them.

In computing the lost sales in the Canadian market, Willis Stevenson, Zenith's accountant, testified that "We have applied the Zenith share of the domestic market as a percentage . . . to arrive at a Zenith share of the Canadian market, expressed in units."

> "The Court: Assuming their share would be what, the same as it is in America or what?
>
> "The Witness: The same as it is in the United States." (A. 513-14)

There was no objection to the witness' assumption at the trial and there is no testimony in this record that the witness' assumption was in error. The only thing opposing the testimony is respondent's lawyer's argument advanced for the first time a year after the trial and which in no event can prevail against this Court's clear ruling that (AA 24): "The trial court was entitled to infer . . . that the necessary causal relation between the pool's conduct and the claimed damage existed." The "claimed damage" was that shown in petitioner's Exhibit D.X. 220.

Finally, there was no way the court below could vacate petitioner's judgment for the Canadian damage without ignoring this Court's statement that (AA 23):

> "Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise

proof, the factfinder may 'conclude . . . that defendants' wrongful acts had caused damage to the plaintiffs.' "

III.

THE DECISION OF THE COURT BELOW IS INCONSISTENT WITH THE OPINION AND MANDATE OF THIS COURT AND THE PLACING OF LIMITATIONS UPON FURTHER PROCEEDINGS IN THE CASE CONSTITUTES CLEAR ERROR AND IS NOT AUTHORIZED BY THIS COURT'S MANDATE.

We have shown in the preceding sections of this brief that there is no error of law in the trial court's rejection of the affirmative defenses of release and limitations. If this Court agrees with our submission then consideration of the issues discussed under this heading becomes redundant so far as the reversal of the new trial order of the court below is concerned. However, since the instant new trial order is unauthorized by this Court's mandate and in present form not only destroys petitioner's rights but the rights of any future treble damage plaintiffs in the Seventh Circuit, we submit, a further discussion of the terms of that order is justified.

The court below has ordered a new trial on the irrelevant issues of release and the statute of limitations, granted respondent an opportunity to introduce evidence to show that Zenith's damage flowing from "damage causing acts" within the period did not amount to $6,297,371 and further reserved to itself the right to determine on a future appeal whether it thinks the damages subsequently to be allowed are "excessive" (AA 59).

(a) The "Overt Act" Doctrine Asserted by the Court Below Has Been Overruled by This Court.

While ambiguous, the opinion of the court below is certainly subject to the construction that on a new trial it limits proof of petitioner's damages to those flowing from specific, concrete "overt" acts occurring only during the damage period. We submit that it is self evident that such proof requirement imposes an impossible burden on a treble damage plaintiff. At best the present new trial order invites a new appeal to find out what it means which can only be had after the completion of a trial on the damage issues. No litigant or counsel could ever outlast such an interminable trial and appellate procedure. This sort of judicial process rivals Dickens' account of *Jarndyce* v. *Jarndyce*.

The order of the court below apparently would limit proof of the loss of profit to that which could be allocated to specific acts within the damage period. As this Court has already held in the instant case and in *Bigelow*, petitioner as a matter of law is not limited to the so-called "overt act" rule in proving damages.

This Court also expressly so held in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 698, 699 (1962). The Court reiterated: ". . . 'and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' . . ."

The attempt by the court below to limit petitioner's damage proofs to specific items of damage allocated to specific overt acts is shown by its statement that the McConnell letter of June 5, 1959 is an act "similar to overt acts occurring in the pre-damage period. Accordingly, Zenith, claiming the right to recover for damage suffered only in the statutory period, is entitled to recover for the

damages it suffered as a result of the June 5 injury" (AA 59).

This resembles the Court of Appeals decision in *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 289 F. 2d 86 (9th Cir. 1961) which this Court reversed and there expressly rejected the "overt act" analysis of the court below. This Court said (370 U. S. 690, 698, 699):

> "The Court then examined seriatim the Apex, Van-Ex, Climax, Canadian and Imperial ventures and ruled separately upon the respondents' alleged damage to Continental in connection with each of these episodes. As to Apex and Imperial, it was said that Continental's demands for oxide from respondents were not sufficiently contemporaneous with the failure of these ventures to subject respondents to liability. . . .
>
> It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. . . .'"

This Court has described the exclusion of Zenith from full activity in the Canadian market as follows (AA 18): "Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed." How much smaller that share was could only be proved by an open market comparison which existed nowhere except in the United States. If Zenith has to prove what specific pool activity caused what lower share of the Canadian market the task would be unending and impossible and the proof

unavailable. This sort of proof requirement would as a practical matter end a treble damage suit arising out of a total or partial exclusion from a market and would give the "green light" to vicious law violation such as the instant record shows. As stated in *Bigelow* the more complete the market exclusion the less chance there would be of any recovery at all.

In the instant case there is no evidence that petitioner's damage was caused by anything other than the illegal patent pool.

This Court says (AA 24):

> ". . . the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause."

We submit, therefore, that it is impossible to reconcile the opinion of this Court with the new trial order directed by the court below and that therefore the court below had no authority to enter the same. See this Court's opinion in *Re Sanford Fork & Tool Co.*, 160 U. S. 247, 255 (1895).

(b) The Exclusion by the Court Below of Any Consideration of the Tolling Statute Is Clear Error.

Not only did the court below err in granting a new trial but its order precludes the assertion of a statutory tolling of limitations. It did this by asserting (1) that tolling was not pleaded by petitioner and (2) that tolling had no merit because of its decision in the *Sun Theatre* case, 213 F. 2d 284, 292, holding that the statute cannot be tolled except against defendants in a government suit. We have answered these contentions at pp. 35-37 of our main brief and that argument need not be repeated here.

It is conceded by respondent (Res. br. 45) that if the tolling statute is applicable it would "enable Zenith to rely upon conduct going back . . . to November 24, 1954, four years prior to the commencement of the government's case against General Electric." This would not only enlarge Zenith's damage period but would make evident the specious character of the argument advanced by respondent about a "mature market."

It is further argued at page 44 of respondent's brief that petitioner could not plead tolling because "it would have been necessary to explain to the trial court why it chose to wait *over three years* after the filing of its answer to file its claim for damages." It is apparent that the three years referred to covered lost profit accruing after the answer was filed thus increasing Zenith's claim for damages to include damage that had not accrued at the date of its answer.

We have already shown in our main brief (p. 36) that Zenith was not obligated to plead tolling in anticipation of a possible limitations defense which actually was never raised until a year and a half after trial. Zenith's counterclaim made clear that Zenith was claiming damages based on exclusion from the Canadian market both before and after the date of its answer to respondent's complaint. See discussion p. 37, *supra*.

(c) The April 5, 1965 Judgment Should Be Reinstated.

The net result of the present disposition of the case by the court below is to destroy petitioner's judgment *and possibly its supersedeas bond as well* and to compel petitioner to try the damage issue all over again on irrelevant affirmative defenses under restrictions inconsistent with the opinion and mandate of this Court.

In *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 650 (1969), just as here, the Court of Appeals vacated a judgment for a treble-damage plaintiff and granted a new trial. This Court reversed the grant of a new trial and reinstated the judgment, saying:

> "We therefore see no need to prolong this litigation which began nearly 10 years ago. The jury's verdict and judgment should be reinstated."

In *Bigelow* the judgment entered in the District Court was reinstated by the mandate of this Court, after this Court had reversed the opinion of the Court of Appeals for the Seventh Circuit holding the "fact of damage" had not been proved. 327 U. S. 251, 266.

This case, which has been in progress for over eleven years, involves the most flagrant forms of the abuses condemned by the decisions of this Court in prior patent pooling cases. In case after case the Court has made clear that Section 1 of the Sherman Act prohibits any concerted acts of patentees to restrain competition. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 196-197 (1963).

The classic statement of the restraint inherent in this kind of patent pool is that of Judge Rifkind in *United States* v. *National Lead Co.*, 63 F. Supp. 513, 523 (S. D. N. Y. 1945), aff'd 332 U. S. 319 (1947) as follows:

> "To have access to the patents of the combination, the stranger must not only have the consent of the member of the combination in whose 'territory' he would operate, but he must adhere to the principles of the combination. The cornerstone of the system was the private regulation of international trade. *The suppression of competition was the cement which held the superstructure in place.*" (Italics ours)

Here the respondent's conduct was not inadvertent. It was continued in the face of numerous government prosecutions involving this very pool,[4] and in the face of the settlement of Zenith's litigation with RCA, General Electric and Western Electric.[5] During the pendency of this case respondent re-asserted its intention to remain in the pool. Hazeltine's counsel, Dodds, when cross-examined in January, 1962 stated (A 178-9):

> "Q. You knew something was going on in the way of an attack by American Companies against that Pool, didn't you?"
> "A. Yes."
> "Q. You knew that for a long time?"
> "A. Yes."
> "Q. You still stayed in the Pool?"
> "A. Most definitely, and we intend to continue to stay in the Pool."

In view of this deliberate and flagrantly illegal conduct we submit that the respondent should not be relieved of the consequences of its wrongdoing by the patently erroneous grant to it of a new trial on the damage issue. As a practical matter, the decision of the court below unless reversed makes the treble damage liability of respondent immune from any effective relief to petitioner.

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4. *United States* v. *General Electric Company, Westinghouse Electric Corporation and N. V. Philips-Gloeilampenfabrieken*, 1962 Trade Cases ¶¶ 70546, 70428, and 70342 (S. D. N. Y. 1962); *United States* v. *Radio Corporation of America*, 1958 Trade Cases ¶ 69164 (S. D. N. Y. 1958); *United States* v. *Radio Corporation of America*, 1932-1939 Trade Cases ¶ 55,015 (D. C. Del. 1932).

5. *R.C.A.* v. *Rauland Corp. & Zenith Radio Corp.*, Civil Action No. 48 C 1818 (N. D. Ill., E. D.) (A 2701, 2726).

CONCLUSION.

For the reasons given here and in our main brief the opinion and judgment of the court below should be reversed and the judgment entered by the District Court on April 5, 1965 reinstated.

Respectfully submitted,

THOMAS C. MCCONNELL,
PHILIP J. CURTIS,
FRANCIS J. MCCONNELL,
JOHN BORST, JR.,
134 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for Petitioner Zenith Radio Corporation.

Of Counsel:
MCCONNELL, CURTIS, MAHON & BORST,
134 South LaSalle Street,
Chicago, Illinois 60603,
RAndolph 6-9131.